

LAWLER, METZGER & MILKMAN, LLC

2001 K STREET, NW  
SUITE 802  
WASHINGTON, D.C. 20006

REGINA M. KEENEY

PHONE (202) 777-7700  
FACSIMILE (202) 777-7763

October 1, 2004

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: WT Docket No. 02-55  
*Ex Parte Presentation*

Dear Ms. Dortch:

At the request of Commission staff, Nextel Communications, Inc. ("Nextel"), through counsel, hereby submits the following information regarding the letter of credit ("LOC") Nextel would be required to provide under the *Report and Order* ("R&O") in the above-referenced proceeding.

First, as detailed in its September 23, 2004 *ex parte* filing in this proceeding, Nextel has stated that the Commission's objectives could be achieved by having one or more letters of credit totaling \$2.5 billion issued by a number of financial institutions, with each institution separately responsible for a proportionate share of the \$2.5 billion LOC amount. Nextel, through counsel, hereby clarifies that it anticipates that no more than ten financial institutions would be issuing such letters of credit. The LOC arrangements could be structured to provide for the designation of a single agent to act on behalf of each of the issuing financial institutions.

Second, the Commission staff has asked Nextel to describe the additional costs and burdens that would result by having the LOC Trustee make frequent and recurring draws under the LOC to disburse funds to cover the costs relating to each incumbent relocation, as opposed to allowing Nextel to pay 800 MHz incumbent relocation costs directly. The standard practice for stand-by letters of credit is that they are only drawn in the event of financial default. Using a stand-by LOC to disburse the thousands of individual payments that will be made over the course of the three-year rebanding process would be atypical, and would inevitably lead to higher processing costs and payment delays. For example, each LOC draw request by the Trustee would be subject to a 0.1% fee, with a minimum fee of \$500 per draw. Consequently, any draw of less than \$500,000 would result in an effective fee of greater than 0.1%. Assuming all \$2.5 billion of the LOC is drawn, and given that many individual draw requests would be less than \$500,000, the draw fees would likely total in excess of \$2.5 million. Thus, the draw fees alone resulting from the frequent and recurring draws contemplated by *R&O* would represent a significant additional cost.

Additionally, frequent and recurring draws on the LOC would increase the Trustee's duties, which likely would result in higher costs charged by the Trustee to compensate it for its increased time and expense. In addition, this approach would likely result in licensees not being paid as quickly because, after Nextel and the licensee have agreed to the payment amount (or the payment amount has been determined pursuant to the dispute resolution mechanism), the Transition Administrator, the Trustee, and LOC fronting banks would each need to coordinate and implement the draw requests before the incumbent licensee could be paid. None of these costs or delays would be incurred if Nextel were allowed to pay incumbent licensees directly.

Third, as discussed in its September 23 *ex parte* filing, Nextel has recommended that the Commission employ, among other criteria, standards set forth in the Trust Indenture Act to determine whether an entity that seeks to act as the LOC Trustee is independent and free of impermissible conflicts of interest. Attached are the relevant excerpts of the Trust Indenture Act concerning such standards. The undersigned emailed copies of these excerpts to Jeffrey Dygert and Neil Dellar on Thursday, September 30, 2004.

Pursuant to section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), this letter and the attachment are being filed electronically for inclusion in the public record of the above-referenced proceeding.

Sincerely,

/s/ Regina M. Keeney  
Regina M. Keeney

*Counsel to Nextel Communications, Inc.*

cc: Michael Wilhelm      Elizabeth Lyle  
Nicole McGinnis      Neil Dellar  
Jeffrey Dygert

Westlaw.

Page 1

15 U.S.C.A. § 77jjj

Effective: [See Text Amendments]

United States Code Annotated Currentness

Title 15. Commerce and Trade

\* Chapter 2A. Securities and Trust Indentures (Refs &amp; Annos)

\* Subchapter III. Trust Indentures (Refs &amp; Annos)

→ § 77jjj. Eligibility and disqualification of trustee

(a) Persons eligible for appointment as trustee

(1) There shall at all times be one or more trustees under every indenture qualified or to be qualified pursuant to this subchapter, at least one of whom shall at all times be a corporation organized and doing business under the laws of the United States or of any State or Territory or of the District of Columbia or a corporation or other person permitted to act as trustee by the Commission (referred to in this subchapter as the institutional trustee), which (A) is authorized under such laws to exercise corporate trust powers, and (B) is subject to supervision or examination by Federal, State, Territorial, or District of Columbia authority. The Commission may, pursuant to such rules and regulations as it may prescribe, or by order on application, permit a corporation or other person organized and doing business under the laws of a foreign government to act as sole trustee under an indenture qualified or to be qualified pursuant to this subchapter, if such corporation or other person (i) is authorized under such laws to exercise corporate trust powers, and (ii) is subject to supervision or examination by authority of such foreign government or a political subdivision thereof substantially equivalent to supervision or examination applicable to United States institutional trustees. In prescribing such rules and regulations or making such order, the Commission shall consider whether under such laws, a United States institutional trustee is eligible to act as sole trustee under an indenture relating to securities sold within the jurisdiction of such foreign government.

(2) Such institution [FN1] trustee shall have at all times a combined capital and surplus of a specified minimum amount, which shall not be less than \$150,000. If such institutional trustee publishes reports of condition at least annually, pursuant to law or to the requirements of said supervising or examining authority, the indenture may provide that, for the purposes of this paragraph, the combined capital and surplus of such trustee shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published.

(3) If the indenture to be qualified requires or permits the appointment of one or more co-trustees in addition to such institutional trustee, the rights, powers, duties, and obligations conferred or imposed upon the trustees or any of them shall be conferred or imposed upon and exercised or performed by such institutional trustee, or such institutional trustee and such co-trustees jointly, except to the extent that under any law of any jurisdiction in which any particular act or acts are to be performed, such institutional trustee shall be incompetent or unqualified to perform such act or acts, in which event such rights, powers, duties, and obligations shall be exercised and

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

15 U.S.C.A. § 77jjj

performed by such co-trustees.

(4) In the case of certificates of interest or participation, the indenture trustee or trustees shall have the legal power to exercise all of the rights, powers, and privileges of a holder of the security or securities in which such certificates evidence an interest or participation.

(5) No obligor upon the indenture securities or person directly or indirectly controlling, controlled by, or under common control with such obligor shall serve as trustee upon such indenture securities.

(b) Disqualification of trustee

If any indenture trustee has or shall acquire any conflicting interest as hereinafter defined--

(i) then, within 90 days after ascertaining that it has such conflicting interest, and if the default (as defined in the next sentence) to which such conflicting interest relates has not been cured or duly waived or otherwise eliminated before the end of such 90-day period, such trustee shall either eliminate such conflicting interest or, except as otherwise provided below in this subsection, resign, and the obligor upon the indenture securities shall take prompt steps to have a successor appointed in the manner provided in the indenture;

(ii) in the event that such trustee shall fail to comply with the provisions of clause (i) of this subsection, such trustee shall, within 10 days after the expiration of such 90-day period, transmit notice of such failure to the indenture security holders in the manner and to the extent provided in subsection (c) of section 77mmmm of this title; and

(iii) subject to the provisions of subsection (e) of section 77ooo of this title, unless such trustee's duty to resign is stayed as provided below in this subsection, any security holder who has been a bona fide holder of indenture securities for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of such trustee, and the appointment of a successor, if such trustee fails, after written request thereof by such holder to comply with the provisions of clause (i) of this subsection.

For the purposes of this subsection, an indenture trustee shall be deemed to have a conflicting interest if the indenture securities are in default (as such term is defined in such indenture, but exclusive of any period of grace or requirement of notice) and--

(1) such trustee is trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of an obligor upon the indenture securities are outstanding or is trustee for more than one outstanding series of securities, as hereafter defined, under a single indenture of an obligor, unless--

(A) the indenture securities are collateral trust notes under which the only collateral consists of securities issued under such other indenture,

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

## 15 U.S.C.A. § 77jjj

(B) such other indenture is a collateral trust indenture under which the only collateral consists of indenture securities, or

(C) such obligor has no substantial unmortgaged assets and is engaged primarily in the business of owning, or of owning and developing and/or operating, real estate, and the indenture to be qualified and such other indenture are secured by wholly separate and distinct parcels of real estate:

*Provided*, That the indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that such provision is excluded) to contain a provision excluding from the operation of this paragraph other series under such indenture, and any other indenture or indentures under which other securities, or certificates of interest or participation in other securities, of such an obligor are outstanding, if--

(i) the indenture to be qualified and any such other indenture or indentures (and all series of securities issuable thereunder) are wholly unsecured and rank equally, and such other indenture or indentures (and such series) are specifically described in the indenture to be qualified or are thereafter qualified under this subchapter, unless the Commission shall have found and declared by order pursuant to subsection (b) of section 77eee of this title or subsection (c) of section 77ggg of this title that differences exist between the provisions of the indenture (or such series) to be qualified and the provisions of such other indenture or indentures (or such series) which are so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as such under one of such indentures, or

(ii) the issuer shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that trusteeship under the indenture to be qualified and such other indenture or under more than one outstanding series under a single indenture is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as such under one of such indentures or with respect to such series;

(2) such trustee or any of its directors or executive officers is an underwriter for an obligor upon the indenture securities;

(3) such trustee directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with an underwriter for an obligor upon the indenture securities;

(4) such trustee or any of its directors or executive officers is a director, officer, partner, employee, appointee, or representative of an obligor upon the indenture securities, or of an underwriter (other than the trustee itself) for such an obligor who is currently engaged in the business of underwriting, except that--

(A) one individual may be a director and/or an executive officer of the trustee and a director and/or an executive officer of such obligor, but may not be at the same time an executive officer of both the trustee and of such obligor,

(B) if and so long as the number of directors of the trustee in office is more than nine, one additional individual may be a director and/or an executive officer of the trustee and a director of such obligor, and

(C) such trustee may be designated by any such obligor or by any underwriter for any such obligor, to act in the capacity of transfer agent, registrar, custodian, paying agent, fiscal agent, escrow agent, or depository, or in any other similar capacity, or, subject to the provisions of paragraph (1) of this subsection, to act as trustee, whether under an indenture or otherwise;

(5) 10 per centum or more of the voting securities of such trustee is beneficially owned either by an obligor upon

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

## 15 U.S.C.A. § 77jjj

the indenture securities or by any director, partner or executive officer thereof, or 20 per centum or more of such voting securities is beneficially owned, collectively by any two or more of such persons; or 10 per centum or more of the voting securities of such trustee is beneficially owned either by an underwriter for any such obligor or by any director, partner, or executive officer thereof, or is beneficially owned, collectively, by any two or more such persons;

(6) such trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default as hereinafter defined--

(A) 5 per centum or more of the voting securities, or 10 per centum or more of any other class of security, of an obligor upon the indenture securities, not including indentures [FN2] securities and securities issued under any other indenture under which such trustee is also trustee, or

(B) 10 per centum or more of any class of security of an underwriter for any such obligor;

(7) such trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default as hereinafter defined, 5 per centum or more of the voting securities of any person who, to the knowledge of the trustee, owns 10 per centum or more of the voting securities of, or controls directly or indirectly or is under direct or indirect common control with, an obligor upon the indenture securities;

(8) such trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default as hereinafter defined, 10 per centum or more of any class of security of any person who, to the knowledge of the trustee, owns 50 per centum or more of the voting securities of an obligor upon the indenture securities;

(9) such trustee owns, on the date of default upon the indenture securities (as such term is defined in such indenture but exclusive of any period of grace or requirement of notice) or any anniversary of such default while such default upon the indenture securities remains outstanding, in the capacity of executor, administrator, testamentary or inter vivos trustee, guardian, committee or conservator, or in any other similar capacity, an aggregate of 25 per centum or more of the voting securities, or of any class of security, of any person, the beneficial ownership of a specified percentage of which would have constituted a conflicting interest under paragraph (6), (7), or (8) of this subsection. As to any such securities of which the indenture trustee acquired ownership through becoming executor, administrator or testamentary trustee of an estate which include them, the provisions of the preceding sentence shall not apply for a period of not more than 2 years from the date of such acquisition, to the extent that such securities included in such estate do not exceed 25 per centum of such voting securities or 25 per centum of any such class of security. Promptly after the dates of any such default upon the indenture securities and annually in each succeeding year that the indenture securities remain in default the trustee shall make a check of its holding of such securities in any of the above-mentioned capacities as of such dates. If the obligor upon the indenture securities fails to make payment in full of principal or interest under such indenture when and as the same becomes due and payable, and such failure continues for 30 days thereafter, the trustee shall make a prompt check of its holdings of such securities in any of the above-mentioned capacities as of the date of the expiration of such 30-day period, and after such date, notwithstanding the foregoing provisions of this paragraph, all such securities so held by the trustee, with sole or joint control over such securities vested in it, shall be considered as though beneficially owned by such trustee, for the purposes of paragraphs (6), (7), and (8) of this subsection; or

(10) except under the circumstances described in paragraphs [FN3] (1), (3), (4), (5) or (6) of section 77kkk(b) of this title, the trustee shall be or shall become a creditor of the obligor.

For purposes of paragraph (1) of this subsection, and of section 77ppp(a) of this title, the term "series of securities" or "series" means a series, class or group of securities issuable under an indenture pursuant to whose terms holders

## 15 U.S.C.A. § 77jjj

of one such series may vote to direct the indenture trustee, or otherwise take action pursuant to a vote of such holders, separately from holders of another such series: *Provided*, That "series of securities" or "series" shall not include any series of securities issuable under an indenture if all such series rank equally and are wholly unsecured.

The specification of percentages in paragraphs (5) to (9), inclusive, of this subsection shall not be construed as indicating that the ownership of such percentages of the securities of a person is or is not necessary or sufficient to constitute direct or indirect control for the purposes of paragraph (3) or (7) of this subsection.

For the purposes of paragraphs (6), (7), (8), and (9) of this subsection--

(A) the terms "security" and "securities" shall include only such securities as are generally known as corporate securities, but shall not include any note or other evidence of indebtedness issued to evidence an obligation to repay moneys lent to a person by one or more banks, trust companies, or banking firms, or any certificate of interest or participation in any such note or evidence of indebtedness;

(B) an obligation shall be deemed to be in default when a default in payment of principal shall have continued for thirty days or more, and shall not have been cured; and

(C) the indenture trustee shall not be deemed the owner or holder of (i) any security which it holds as collateral security (as trustee or otherwise) for any obligation which is not in default as above defined, or (ii) any security which it holds as collateral security under the indenture to be qualified, irrespective of any default thereunder, or (iii) any security which it holds as agent for collection, or as custodian, escrow agent or depository, or in any similar representative capacity.

For the purposes of this subsection, the term "underwriter" when used with reference to an obligor upon the indenture securities means every person who, within one year prior to the time as of which the determination is made, was an underwriter of any security of such obligor outstanding at the time of the determination.

Except in the case of a default in the payment of the principal of or interest on any indenture security, or in the payment of any sinking or purchase fund installment, the indenture trustee shall not be required to resign as provided by this subsection if such trustee shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that--

(i) the default under the indenture may be cured or waived during a reasonable period and under the procedures described in such application, and

(ii) a stay of the trustee's duty to resign will not be inconsistent with the interests of holders of the indenture securities. The filing of such an application shall automatically stay the performance of the duty to resign until the Commission orders otherwise.

Any resignation of an indenture trustee shall become effective only upon the appointment of a successor trustee and

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

15 U.S.C.A. § 77jjj

such successor's acceptance of such an appointment.

(c) Applicability of section

The Public Utility Holding Company Act of 1935 [15 U.S.C.A. § 79 et seq.] shall not be held to establish or authorize the establishment of any standards regarding the eligibility and qualifications of any trustee or prospective trustee under an indenture to be qualified under this subchapter, or regarding the provisions to be included in any such indenture with respect to the eligibility and qualifications of the trustee thereunder, other than those established by the provisions of this section.

CREDIT(S)

(May 27, 1933, c. 38, Title III, § 310, as added Aug. 3, 1939, c. 411, 53 Stat. 1157, and amended Nov. 15, 1990, Pub.L. 101-550, Title IV, §§ 406 to 408, 104 Stat. 2723, 2724.)

[FN1] So in original. Probably should be "institutional".

[FN2] So in original. Probably should be "indenture".

[FN3] So in original. Probably should be "paragraph".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Acts. House Report No. 101-240 and House Conference Report No. 101- 924, see 1990 U.S. Code Cong. and Adm. News, p. 3888.

References in Text

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is Act Aug. 26, 1935, c. 687, Title I, 49 Stat. 838, which is classified generally to chapter 2C (section 79 et seq.) of this title. For complete classification of this Act to the Code, see section 79 of this title and Tables.

Amendments

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.



## 15 U.S.C.A. § 77jjj

1990 Amendments. Subsec. (a)(1). Pub.L. 101-550, § 406(1) to (4), substituted "There shall" for "The indenture to be qualified shall require that there shall", and "under every indenture qualified or to be qualified pursuant to this subchapter" for "thereunder", and inserted "or a corporation or other person permitted to act as trustee by the Commission" before "(referred to" and provisions permitting a corporation or other person organized and doing business under the laws of a foreign government, if qualified, to act as sole trustee under an indenture and directing the Commission in prescribing rules and regulations to consider whether a United States institutional trustee is eligible to act as sole trustee under the laws of such foreign government.

Subsec. (a)(2). Pub.L. 101-550, § 406(5), which directed the substitution of "Such institution" for "The indenture to be qualified shall require that such institution", was executed by making the substitution for "The indenture to be qualified shall require that such institutional", as the probable intent of Congress.

Subsec. (a)(3). Pub.L. 101-550, § 406(6), struck out "such indenture shall provide that" before "the rights".

Subsec. (a)(4). Pub.L. 101-550, § 406(7), (8), struck out "the indenture to be qualified shall require that" before "the indenture" and inserted "shall" after "the indenture trustee or trustees".

Subsec. (a)(5). Pub.L. 101-550, § 407, added par. (5).

Subsec. (b). Pub.L. 101-550, § 408, amended subsec. (b) generally providing that the indenture securities be in default for the indenture trustee to be deemed to have a conflicting interest, inserting references to outstanding series of securities, eliminating provision that such trustee or any of its directors or executive officers be an obligor upon the indenture securities, substituting reference to the date of default upon the indenture securities or any anniversary of such default for reference to May 15 of any calendar year, adding provision defining "securities" and "series" for purposes of par. (1) of this subsection and section 77ppp(a) of this title, and inserting exception to resignation by an indenture trustee, except in the case of a default in payment of the principal or interest on any indenture security, or in the payment of any sinking or purchase fund installment, upon the indenture trustee sustaining a specified burden of proof on an application to the Commission.

## Transfer of Functions

For transfer of the functions of the Securities and Exchange Commission, with certain exceptions, to the chairman of such commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

## CODE OF FEDERAL REGULATIONS

Trust Indenture Act of 1939, general rules and regulations, see 17 CFR § 260.0-1 et seq.

## LIBRARY REFERENCES

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

15 U.S.C.A. § 77jjj

American Digest System

Trust indentures generally, see Securities Regulation ~~29~~29.10 et seq.

#### RESEARCH REFERENCES

##### Encyclopedias

Am. Jur. 2d Securities Regulation-Federal § 6, Generally.

Am. Jur. 2d Securities Regulation-Federal § 877, Requirements and Eligibility.

Am. Jur. 2d Securities Regulation-Federal § 878, Disqualification Based on Conflicting Interest.

Am. Jur. 2d Securities Regulation-Federal § 934, Generally; Express Causes of Action.

##### Forms

Federal Procedural Forms § 59:293, Under Trust Indenture Act.

Manual of Corporate Forms for Securities Practice § 1:28, Investment Regulation.

##### Treatises and Practice Aids

Acquisitions and Mergers: Negotiated and Contested Transactions App. 1B, Appendix 1B. Exchange Act Release Numbers 34-37260; 35-26524; Ic-21997: "Ownership Reports and Trading by Officers, Directors and Principal Security Holders" (May 30, 1996).

Bogert - the Law of Trust's and Trustees § 131, Private Corporations as Trustees.

Bogert - the Law of Trust's and Trustees § 250, Trusts Used Primarily for Business Purposes: Trusts to Secure or Pay Creditors.

Bogert - the Law of Trust's and Trustees § 511, Resignation by Act of the Trustee.

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

15 U.S.C.A. § 77jjj

Bogert - the Law of Trust's and Trustees § 519, Removal of Trustees-Court's Power to Remove.

Bogert - the Law of Trust's and Trustees § 527, Grounds for Removal.

Bogert - the Law of Trust's and Trustees § 543, Trustee's Duty of Loyalty to the Beneficiaries.

Bogert - the Law of Trust's and Trustees § 554, Powers of Trustees Usually Joint, Not Several.

Federal Procedure, Lawyers Edition § 70:321, Generally; Express Causes of Action.

Norton Creditor's Rights Handbook § 15:3, the Structure of the Tia.

Securities Crimes § 6:31, Trust Indenture Act of 1939.

US § L. Int'L Fin. Trans. & Cap. Markets 2d Ed § 4:45, Introduction.

US § L. Int'L Fin. Trans. & Cap. Markets 2d Ed § 4:50, Content of the Indenture.

US § L. Int'L Fin. Trans. & Cap. Markets 2d Ed § 4:51, Trustees.

US § L. Int'L Fin. Trans. & Cap. Markets 2d Ed § 4:52, Foreign Trustees.

US § L. Int'L Fin. Trans. & Cap. Markets 2d Ed § 4:54, Conflicts of Interest.

US § L. Int'L Fin. Trans. & Cap. Markets 2d Ed § 12:33, Form 40-F.

15 U.S.C.A. § 77jjj, 15 USCA § 77jjj

Current through P.L. 108-303 approved 09-08-04

Copr. © 2004 West, a Thomson business. No Claim to Orig. U.S. Govt. Works

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

15 U.S.C.A. § 77jjj

END OF DOCUMENT

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.